No. 14-6368

IN THE

Supreme Court of the United States

MICHAEL B. KINGSLEY,
Petitioner,

v.

STAN HENDRICKSON AND FRITZ DEGNER,
Respondents.

ORIGINAL

Supreme Court, U.S.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All the parties to the proceeding are listed in the caption. The petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
I. BACKGROUND OF THE CASE	3
A. Factual Background	3
B. Proceedings Below	4
REASONS FOR GRANTING THE PETITION	8
I. A DEEP SPLIT DIVIDES THE CIRCUITS ON THE APPLICABLE STANDARD GOVERNING PRETRIAL DETAINEES' EXCESSIVE FORCE CLAIMS	8
II. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY PRETRIAL DETAINEES SHOULD TRACK THE EIGHTH AMENDMENT OR THE FOURTH AMENDMENT	11

TABLE OF CONTENTS—continued

	Page
III. THE SEVENTH CIRCUIT'S APPROACH FALLS ON THE WRONG SIDE OF THE SPLIT AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION.	13
CONCLUSION	15
APPENDIX	1a
APPENDIX A: Opinion, *Kingsley* v. *Hendrickson*, No. 12-3639 (7th Cir. Mar. 3, 2014), ECF No. 35	1a
APPENDIX B: Final Judgment, *Kingsley* v. *Hendrickson*, No. 12-3639 (7th Cir. Mar. 3, 2014), ECF No. 36	49a
APPENDIX C: Order, *Kingsley* v. *Hendrickson*, No. 12-3639 (7th Cir. Apr. 18, 2014), ECF No. 45	50a
APPENDIX D: Opinion and Order, *Kingsley* v. *Hendrickson*, No. 10-cv-832-bbc (W.D. Wis. Nov. 16, 2011), ECF No. 69	52a
APPENDIX E: Judgment in a Civil Case, *Kingsley* v. *Hendrickson*, No. 10-cv-832-bbc (W.D. Wis. Oct. 23, 2012), ECF No. 150	72a
APPENDIX F: Excerpts of Oct. 15, 2012 Jury Trial Transcript, *Kingsley* v. *Hendrickson*, No. 10-cv-832-bbc (W.D. Wis. Nov. 5, 2012), ECF No. 154	73a
APPENDIX G: Excerpts of Oct. 17, 2012 Jury Trial Transcript, *Kingsley* v. *Hendrickson*, No. 10-cv-832-bbc (W.D. Wis. Nov. 5, 2012), ECF No. 156	83a

TABLE OF AUTHORITIES

Page(s)

CASES

Andrews v. *Neer*, 253 F.3d 1052 (8th Cir. 2001) 9, 12
Bell v. *Wolfish*, 441 U.S. 520 (1979) 11, 14
Bender v. *Brumley*, 1 F.3d 271 (5th Cir. 1993) 10, 13
Bozeman v. *Orum*, 422 F.3d 1265 (11th Cir. 2005) 10, 12
Estate of Booker v. *Gomez*, 745 F.3d 405 (10th Cir. 2014) 9
Fuentes v. *Wagner*, 206 F.3d 335 (3d Cir. 2000) 10, 12
Gibson v. *Cnty. of Washoe*, 290 F.3d 1175 (9th Cir. 2002) 9, 12
Graham v. *Connor*, 490 U.S. 386 (1989) 11, 12
Griffin v. *Hardrick*, 604 F.3d 949 (6th Cir. 2010) 10, 12
Justice v. *Dennis*, 793 F.2d 573 (4th Cir. 1986) 9
Norris v. *District of Columbia*, 737 F.2d 1148 (D.C. Cir. 1984) 9
Shreve v. *Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681 (6th Cir. 2006) 14
United States v. *Feola*, 420 U.S. 671 (1975) 14
United States v. *Walsh*, 194 F.3d 37 (2d Cir. 1999) 10, 13
Wilson v. *Williams*, 83 F.3d 870 (7th Cir. 1996) 13

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTION AND STATUTE

42 U.S.C. § 1983 2
U.S. Const. amend. IV 1
U.S. Const. amend. VIII 2
U.S. Const. amend. XIV, § 1 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kingsley respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 744 F.3d 443 and is reproduced in the appendix to this petition at Pet. App. 1a-48a. The judgment of the Western District of Wisconsin is unpublished and is reproduced at Pet. App. 72a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on March 3, 2014, Pet. App. 49a, and denied Mr. Kingsley's petition for rehearing en banc on April 18, 2014, Pet. App. 50a-51a. On July 2, 2014, this Court granted an application (No. 14A11) to extend the time to file a petition for a writ of certiorari until August 18, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend. IV.

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor

excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

The statutory provision involved is 42 U.S.C. § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

The decision of the Seventh Circuit in this case represents one position of several in a split among the federal courts of appeals on the question of whether an excessive force claim pursuant to 42 U.S.C. § 1983 brought by a pretrial detainee requires a showing of the state actor's subjective intent in addition to the objective unreasonableness of the force. Five circuit courts have held that the plaintiff need not prove the subjective intent of the state actor to cause harm at the time the force was used. The Seventh Circuit, along with five other circuits, however, has held that the plaintiff must shoulder the additional burden of

proving that the state actor used force against the pretrial detainee with the intent to violate his constitutional rights.

As a result of these differing standards, the success of a pretrial detainee's excessive force claim depends, in part, on where the claim is brought.

I. BACKGROUND OF THE CASE

A. Factual Background

Petitioner Michael Kingsley was arrested and booked as a pretrial detainee into Monroe County Jail in Sparta, Wisconsin on April 21, 2010. Pet. App. 2a, 54a. On May 20-21, 2010, jail officers ordered Mr. Kingsley to remove a piece of paper that was affixed to the light in his cell. Mr. Kingsley told the officers that he had not put the paper there, and refused to remove it. Pet. App. 54a-55a. Consequently, the officers decided to transfer him to a "receiving" cell so that jail staff could remove the paper. Pet. App. 56a.

Defendants, Sergeant Stan Hendrickson and Deputy Fritz Degner, and others participated in transferring Mr. Kingsley to the receiving cell. *Id.* To do so, the officers first entered Mr. Kingsley's original cell, handcuffed him behind his back while he was lying face down on his bunk, and carried him from the original cell to the receiving cell. Pet. App. 56a-57a. Portions of the transfer were captured on video. Pet. App. 57a. During the transfer, Mr. Kingsley did not walk of his own volition but did not threaten or actively resist the officers—rather, he groaned and complained that he could not walk because the officers had banged his leg against the bunk in picking him up. Pet. App. 4a.

In the receiving cell, Mr. Kingsley was placed face down onto a cement bunk with his hands handcuffed

behind his back. Pet. App. 57a. Five corrections officers, blocking the view of the cell's only camera, surrounded Mr. Kingsley. Pet. App. 57a-58a. The officers tried to remove the handcuffs, but had difficulty doing so. Pet. App. 58a. According to the officers, Mr. Kingsley was tensing his arms and resisting removal of the handcuffs—an allegation Mr. Kingsley denies. *Id.*; Pet. App. 5a. Sergeant Hendrickson directed Deputy Degner to "tase" Mr. Kingsley, ostensibly to permit the officers to remove the handcuffs. Pet. App. 5a n.4. Deputy Degner "tased" Mr. Kingsley on his upper back for five seconds, resulting in extreme pain. Pet. App. 5a. Afterwards the officers left him alone in the cell while still handcuffed. Pet. App. 58a. Other officers were later able to remove Mr. Kingsley's handcuffs without incident. Pet. App. 59a.

B. Proceedings Below

Mr. Kingsley filed suit pro se pursuant to 42 U.S.C. § 1983 alleging Sergeant Hendrickson and Deputy Degner used excessive force during the incident, violating his right to be free from punishment as a pretrial detainee. Pet. App. 6a. The officers filed a motion for summary judgment, which the district court denied after viewing a video of the events in the receiving cell. *Id.* Specifically, the court ruled there was a genuine issue of material fact whether the officers' use of force was disproportionate to the situation. Pet. App. 63a-64a. Following the denial of the officers' motion for summary judgment, the district court appointed pro bono counsel to represent Mr. Kingsley at trial. Pet. App. 7a.

At the trial, both parties presented experts on the use of force. Mr. Kingsley presented the testimony of an expert witness, Brian Landers, a veteran police officer, academy instructor, and a member of the Wisconsin Department of Justice Tactical Advisory

Committee on Defense and Arrest Tactics. Pet. App. 74a-77a. Mr. Landers opined that the use of the taser under the totality of the circumstances did not comport with professional standards and was unreasonable. Pet. App. 78a-82a.

At the jury instruction conference, Mr. Kingsley objected to the district court's proposed instructions, which required a showing of subjective intent, and argued that the standard for excessive force claims brought by pretrial detainees should track the Fourth Amendment. Pet. App. 84a-87a. In other words, Mr. Kingsley argued, the correct standard requires only a showing that the force used was unreasonable. *Id.* Based on applicable Seventh Circuit precedent and the Seventh Circuit Pattern Jury Instructions, Mr. Kingsley argued that there was no need to instruct the jury on the defendants' subjective intent, because the jury may determine unreasonableness from objective factors. *Id.* Over Mr. Kingsley's objection, the district court deviated from the pattern jury instructions and required Mr. Kingsley to show that Appellees applied force "recklessly," "recklessly disregarded plaintiff's safety," and acted with "reckless disregard of plaintiff's rights." Pet. App. 8a-9a. With these phrases placed in context, the jury instructions are as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence:
>
> (1) Defendants used force on plaintiff;

(2) Defendants' use of force was unreasonable in light of the facts and circumstances of the time;

(3) Defendants knew that using force presented a risk of harm to plaintiff, but they *recklessly disregarded plaintiff's safety* by failing to take reasonable measures to minimize the risk of harm to plaintiff; and

(4) Defendants' conduct caused harm to plaintiff.

In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.

Also, in deciding whether one or more defendants used unreasonable force and acted with *reckless disregard of plaintiff's rights*, you may consider factors such as:

- The need to use force;
- The relationship between the need to use force and the amount of force used;
- The extent of plaintiff's injury;
- Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and
- Any efforts made by defendants to limit the amount of force used.

See Pet. App. 8a-9a (emphases added).

Following deliberations, the jury found for the defendants. The district court entered judgment, and Mr. Kingsley timely appealed.

On appeal to the Seventh Circuit, Mr. Kingsley again argued that under prevailing case law, the applicable standard for excessive force claims brought by a pretrial detainee is whether the conduct is objectively unreasonable. Appellant's Br. 11-16. Mr. Kingsley further argued that to the extent a showing of intent is required, that requirement is met where the conduct is deliberate, as opposed to merely negligent. Appellant's Br. 13. Thus, Mr. Kingsley argued the jury instructions below improperly required him to show subjective elements derived from the Eighth Amendment to prevail on his excessive force claim. Appellant's Br. 18-21.

On March 3, 2014, a divided three-judge panel of the Seventh Circuit affirmed. The majority applied the Due Process Clause of the Fourteenth Amendment in evaluating Mr. Kingsley's excessive force claim because it found a pretrial detainee neither an arrestee (protected from unreasonable seizure by the Fourth Amendment) nor a sentenced prisoner (protected from cruel and unusual punishment by the Eighth Amendment). Rather, a pretrial detainee is entitled to an intermediate level of protection. Pet. App. 11a. Although the panel highlighted that the controlling case in the circuit held that "the propriety of using force on a person in custody pending trial will track the Fourth Amendment: the court must ask whether the officials behaved in a reasonable way in light of the facts and circumstances confronting them," the panel nonetheless concluded that the test is not wholly objective. Pet. App. 15a. (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)). The panel asserted that the circuit's prior cases "make

clear that, although we employ the objective criteria of the Fourth Amendment as a touchstone by which to measure the gravity of the defendant officer's conduct, we also recognize, quite clearly, the need for a subjective inquiry into the defendant's state of mind in performing the activity under scrutiny." Pet. App. 17a-18a.

Judge Hamilton dissented, highlighting the confusion among the pretrial detainee excessive force cases both within the Seventh Circuit and across the country. He criticized the panel majority for introducing a new, additional element into the claim and effectively allowing officers an escape hatch, even when they use objectively unreasonable force. Pet. App. 27a. (asking "[w]hen does the Constitution allow law enforcement and correctional officers to use *objectively unreasonable* force against a person not convicted of a crime?"(emphasis added)).

REASONS FOR GRANTING THE PETITION

I. A DEEP SPLIT DIVIDES THE CIRCUITS ON THE APPLICABLE STANDARD GOVERNING PRETRIAL DETAINEES' EXCESSIVE FORCE CLAIMS.

The courts of appeals are fractured on the elements of an excessive force claim brought by a pretrial detainee under 42 U.S.C. § 1983. Specifically, the courts do not agree as to whether the governing test is purely objective or whether it requires the plaintiff to prove some sort of subjective intent on the part of the offending officers.

Five circuits—the Fourth, Eighth, Ninth, Tenth, and D.C. Circuits—require proof only of objectively unreasonable force; they do not require the pretrial detainee to prove the state actor's subjective intent at

the time of the incident. See *Justice* v. *Dennis*, 793 F.2d 573, 576-78 (4th Cir. 1986) ("The fundamental inquiry in all excessive force cases, regardless of the protected interest's fourth, fifth or eighth amendment origins, is whether the degree of force was necessary to protect a legitimate state interest, and therefore permissible under all the circumstances. . . . Proof of bad motive, evil intent, or 'ulterior purpose' is not required."); *Andrews* v. *Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001) ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1048-49 (8th Cir. 1989))); *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (holding that an objectively reasonable test applies because "we have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce* v. *Multnomah Cnty.*, 76 F.3d 1032, 1043 (9th Cir. 1996))); *Estate of Booker* v. *Gomez*, 745 F.3d 405, 426-27 (10th Cir. 2014) (holding that objective factors demonstrated "excessive zeal behind the use of force" on the plaintiff, the court stated it has never "disposed of a due process excessive force claim solely on the 'motive' factor when disproportionate force and serious injury were present."); *Norris* v. *District of Columbia*, 737 F.2d 1148, 1156 (D.C. Cir. 1984) ("If the degree of force is unreasonable in response to the justification [for the force], the application of the excessive force is unconstitutional.").

Six circuits—the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits—require a pretrial-detainee plaintiff in an excessive force case to show

the defendant's subjective intent to violate the detainee's constitutional rights. And even those that fall on this side of the split cannot agree on what level of subjective intent must be proven; the spectrum ranges from reckless to wanton to malicious to sadistic intent. See *United States* v. *Walsh*, 194 F.3d 37, 49-50 (2d Cir. 1999) ("*Hudson* highlights two conditions, one subjective and the other objective, that must be met in order to establish a constitutional claim in the prison context. . . . [T]he subjective requirement is satisfied if the defendant has a 'sufficiently culpable state of mind,' [*Hudson* v. *McMillian*] 503 U.S. [1,] 8 . . . 'shown by actions characterized by wantonness' . . . ." (quoting *Blyden* v. *Mancusi*, 186 F.3d 252, 262 (2d Cir. 1999))); *Fuentes* v. *Wagner*, 206 F.3d 335, 346 (3d Cir. 2000) ("Fuentes was not entitled to an 'objective reasonableness' instruction."); *Bender* v. *Brumley*, 1 F.3d 271, 278 (5th Cir. 1993) ("In short, when determining what standard applies to excessive force claims brought by pre-trial detainees, the proper due process inquiry . . . . probes the subjective intent of the detaining officers."); *Griffin* v. *Hardrick*, 604 F.3d 949, 954 (6th Cir. 2010) ("[T]he court must determine whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (quoting *Watkins* v. *Evans*, No. 95-4162, 1996 WL 499094, at *2 (6th Cir. Sept. 3, 1996))); *Boxeman* v. *Orum*, 422 F.3d 1265, 1271 (11th Cir. 2005) ("Under [the excessive force] standard, 'whether or not a prison guard's application of force is actionable turns on whether that force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm.'" (quoting *Brown* v. *Smith*, 813 F.2d 1187, 1188 (11th Cir. 1987))).

Had the incident involving Mr. Kingsley occurred in the Fourth, Eighth, Ninth, Tenth, or D.C. Circuits, the jury would have been instructed on the objective standard contained within Mr. Kingsley's proposed instructions. Those circuits do not condition the success of the plaintiff's claim on whether he can prove the subjective intent of the state actor at the time of the incident. The Seventh Circuit, along with five other circuits, however, significantly increases the burden on the plaintiff by requiring proof of an additional subjective element. The excessive force claims of similarly situated defendants should not hinge on the jurisdiction in which claims are brought. Review is warranted to resolve this split and define the contours of a pretrial detainee's Constitutional protection from excessive force by state actors.

II. THE COURTS OF APPEALS ARE SPLIT ON WHETHER THE STANDARD FOR EXCESSIVE FORCE CLAIMS BROUGHT BY PRETRIAL DETAINEES SHOULD TRACK THE EIGHTH AMENDMENT OR THE FOURTH AMENDMENT.

The split identified above stems from the fact that the circuits likewise cannot agree as to which constitutional right underlies a pretrial detainee's excessive force claim, a question this Court in *Graham* v. *Connor*, 490 U.S. 386 (1989), left open. Specifically, although this Court has held that due process of law requires that a pretrial detainee be free from punishment, *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979), it has "not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins," *Graham*, 490 U.S. at 395 n.10. As this Court recognized, the very starting

point of the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Id.* at 394. However, circuit courts have begun the analysis from different places, and have produced an amalgam of varying standards based on the protections guaranteed by the Fourth and/or Eighth Amendments.

For example, the Ninth and Eighth Circuits apply a Fourth Amendment-style standard based on due process. *Gibson*, 290 F.3d at 1197 ("[T]he Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting *Pierce*, 76 F.3d at 1043)); *Andrews*, 253 F.3d at 1060 ("The evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard." (citing *Johnson-El*, 878 F.2d at 1048-49)).

The Third, Sixth, and Eleventh Circuits apply a standard akin to the Eighth Amendment. *Fuentes*, 206 F.3d at 347 ("[W]e hold that the Eighth Amendment cruel and unusual punishments standards. . . apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance." (emphasis omitted)); *Griffin*, 604 F.3d at 953 (applying the Eighth Amendment standard, the court held that "[t]he law is unsettled as to whether the analysis for a Fourteenth Amendment excessive-force claim and an Eighth Amendment excessive-force claim is the same."); *Bozeman*, 422 F.3d at 1271 (holding that technically the constitutional standard is the Fourteenth Amendment rather than the Eighth Amendment, "[b]ut it makes no difference whether [plaintiff] was a pretrial detainee or a convicted prisoner because 'the applicable standard is the same.'" (quoting

Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996))).

Perhaps the most confusing standards are those adopted by the Second, Fifth, and Seventh Circuits, where a combination of the Eighth and Fourth Amendments are applied. *Walsh*, 194 F.3d at 49 (holding the Fourteenth Amendment applies, but the standard requires two conditions, "one subjective and the other objective."); *Bender*, 1 F.3d at 278 (holding the Fourteenth Amendment applies, but the standard "probes the subjective intent of the detaining officers."); *Wilson v. Williams*, 83 F.3d 870, 875 (7th Cir. 1996) ("In this circuit, we have recognized the insufficiency of the Eighth Amendment's protections for pretrial detainees and have held that to prevail on a Fourteenth Amendment claim, a plaintiff must prove that the defendant(s) 'acted deliberately or with callous indifference, evidenced by an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'" (quoting *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988))).

This Court should resolve this threshold inquiry in order to ensure uniformity among the circuits on the question of the elements of excessive force claims by pretrial detainees.

III. THE SEVENTH CIRCUIT'S APPROACH FALLS ON THE WRONG SIDE OF THE SPLIT AND THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION.

The Seventh Circuit wrongly tethers its Fourteenth Amendment excessive force standard to the Eighth Amendment—and asks too much of pretrial detainee plaintiffs by forcing them to establish a subjective intent in addition to objectively unreasonable force. First, unreasonable force is de facto evidence of pun-

ishment for purposes of the Due Process protections of the Fourteenth Amendment. Therefore, the Seventh Circuit's approach runs afoul of this Court's precedent by requiring a plaintiff to prove more. *Bell*, 441 U.S. at 535; see also Pet. App. 27a (Hamilton, J., dissenting) (explaining that, "[i]f a pretrial detainee can prove that a correctional officer used objectively unreasonable force against him, it should be self-evident that the detainee was 'punished' without due process of law."). And the Seventh Circuit's incorporation of Eighth Amendment subjective language into the standard does not adequately vindicate a pretrial detainee's rights. Indeed, the Court generally disfavors requiring a showing of subjective intent to harm. Cf. *United States* v. *Feola*, 420 U.S. 671, 684 (1975) (holding the government need not prove the specific intent of the accused to harm a federal agent because "[a] contrary conclusion would give insufficient protection to the agent."). In contrast, application of the Fourth Amendment objective standard to pretrial detainees would vindicate these rights, equalize the treatment between those who are able to make bail and those who cannot (and thus are often housed with convicted prisoners), see, *e.g.*, *Shreve* v. *Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681 (6th Cir. 2006), and clearly demarcate the different rights accorded to convicted prisoners and those that have not yet been found guilty beyond a reasonable doubt.

Mr. Kingsley's case is an ideal vehicle for this Court to consider these questions. The officers applied a taser to Mr. Kingsley when he presented no objectively reasonable threat. Had the officers' subjective intent not been placed in issue by the trial court's jury instruction, the jury likely would have found that the officers violated Mr. Kingsley's constitutional rights through their actions. The issue was cleanly pre-

served before trial, after trial and on appeal. The case is not encumbered by procedural anomalies or alternate grounds of decision. And the Seventh Circuit explicitly recognized the split of authority; Judge Hamilton's dissent ably laid bare the difficulties with the panel majority's approach. And because nearly every circuit has weighed in on the question, it is ripe for this Court's review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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